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NO. 88-1327

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PEDRO DELGADO, ELIA GREGORIO, MARCELO LLANES and MARTA R. TORRES,
Petitioners,

vs.

JIM SMITH, in his official capacity as Secretary of State of the State of Florida, DAVID LEAHY, in his official capacity as the Supervisor of Elections of Dade County, Florida and as a representative of a defendant class of all County Supervisors of Elections in the State of Florida, FLORIDA ENGLISH CAMPAIGN, U.S.ENGLISH LEGISLATIVE TASK FORCE, INC., and U.S.ENGLISH FOUNDATION, INC.,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Non-governmental respondents hereby respectfully pray that this Court summarily affirm the decision of the courts below, deny the petition for writ of certiorari, or, if a writ of certiorari is granted at all, issue the writ on Question 3 listed above.

QUESTIONS PRESENTED

Being dissatisfied with the Questions Presented by petitioners in this case, non-governmental respondents hereby say that the questions in this case are:

1. Whether the Tenth and Eleventh Circuits correctly concluded that the Voting Rights Act does not require petitions circulated by private citizens to be printed in Spanish and English since (a) the circulation and signing of initiative petitions does not constitute "voting" within the meaning of the Act and (b) the act of circulating initiative petitions by private citizens does not constitute state action simply because the form of such petitions is regulated by the State?

2. Where (a) neither the statute nor the case law provides any right to a three-judge panel to review claims brought by private individuals that petitions circulated by private citizens must be printed in Spanish and English and (b) the request for a three-judge panel was not raised before the Court of Appeals, did the lower courts err in fully adjudicating and denying such claims on an expedited basis without invoking a three-judge panel?

3. Whether the attempt by the U.S. Department of Justice to require that petitions circulated by private citizens be printed in Spanish and English goes so far beyond the Voting Rights Act that it infringes on the First Amendment rights of the citizen circulators?

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JURISDICTION

The jurisdiction of this Court was invoked under 28 U.S.C.A. § 1254(1). Respondents' counsel received the petition on February 14, 1989; permission was granted, after motion, for an extension of time to respond until March 27, 1989.

Petitioners' invocation of jurisdiction was qualified by a claim that neither of the lower courts had jurisdiction. Petition for Writ of Certiorari (hereinafter Pet.) at 1-2. For reasons more fully explained in the Reasons for Denying the Writ below, this Court lacks jurisdiction to hear this case. Briefly, (1) petitioners failed to raise their three-judge panel claim at the Court of Appeals, and (2) petitioners complain only about the Official Language initiative enacted last November, rendering this controversy moot.

In addition, Respondents note that the trial of this matter indicated a serious question of whether petitioners have standing to bring this action. Although petitioners claimed that they were harmed by not having sufficient advance notice of the circulation of the English-language petitions which were the subject of this proceeding, Pet. at 6, trial testimony demonstrated conclusively that petitioners and many others similarly situated had notice of the initiative and its contents many months before the initiative was qualified for the ballot. *See, e.g., In re: Advisory Opinion to the Attorney General: English - The Official Language of Florida*, 520 So.2d 11 (Fla. 1988)(fifteen organizations filed amicus briefs in opposition to proposed initiative). In fact, petitioners' expert witness testified that his efforts to organize opposition to the initiative were unsuccessful solely due to apparent apathy in the community; this lack of opposition was

confirmed when the initiative received 84 percent of the vote in the November 1988 election.

STATEMENT OF CONTEXT

Seventeen states have enacted laws designating English as their official languages.[1] This petition is one of three concurrent attempts by opponents of successful official language initiatives to obtain from this Court what the voters refused them: disapproval of the designation of English as the official language of a jurisdiction. *See*, *Montero v. Meyer*, No. 88-6376; *In re Delgado*, No. 88-1329. Several of the issues in this petition have been dealt with in the other two petitions; to avoid repetition, those responses will only be summarized herein.

REASONS FOR DENYING THE WRIT

I. THE COURT LACKS JURISDICTION TO HEAR THIS MATTER

A. The November 1988 Election on this Initiative Renders This Matter Moot.[2]

The initiative challenged by petitioners was approved by Florida's voters in the November 1988

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1 Arizona (1988), Arkansas (1987), California (1986), Colorado (1988), Florida (1988), Georgia (1986), Hawaii (1978), Illinois (1969), Indiana (1985), Kentucky (1984), Mississippi (1987), Nebraska (1920), North Carolina (1987), North Dakota (1987), South Carolina (1987), Tennessee (1984), and Virginia (1986).

2 The argument summarized here is made more fully in the Opposition to the Petition for Writ of Certiorari in *Montero v. Meyer*, No. 88-6376 (hereinafter Montero Opp.), P. 5

general election. This Court could exercise jurisdiction only if the controversy is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911).

Petitioners challenged only this initiative. They did not certify this as a class action. In the absence of a class action, petitioners must show:

1. The challenged action was too short to be fully litigated; and

2. There is a reasonable expectation that the complaining party would be subjected to the same action again.

Weinstein v. Bradford, 423 U.S. 147, 149 (1975).

Neither of these showings can be made: petitioners had plenty of time to challenge the initiative (as others did in *In re Advisory Opinion*, *supra*), and since the initiative passed, it will not come before petitioners again.

B. Petitioners' Three-judge Panel Claim Was Not Adequately Pursued Below.[3]

This Court lacks jurisdiction to hear petitioners' three-judge panel claim because petitioners failed to pursue their claim before the Court of Appeals. Petitioners raised this issue in a footnote in their brief to the Court of Appeals, but did not ask that court to rule on the three-judge panel issue. Petition for Writ of Mandamus, No. 88-1329 (hereinafter Mandamus Pet.) at 7.

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3 The argument summarized here is made more fully in the Opposition to the Petition for Writ of Mandamus in *In re Delgado*, No. 88-1329 (hereinafter Mandamus Opp.).

Since petitioners failed to ask for relief from the Court of Appeals, they cannot ask for relief from this Court. *McLucas v. De Champion*, 421 U.S. 21, 30 (1975)("[W]e have held that, when a single district judge fails to call for the convention of a three-judge court and goes on to dispose of the case, an appeal lies only to the court of appeals.")

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY OTHER DECISION[4]

There is no conflict between the decision below and decisions of this Court and of other courts of appeal. As to courts which have looked specifically at petitioners' claims under the Voting Rights Act, the Eleventh Circuit noted: "the overly broad interpretation of the Act urged by appellants has been rejected by every court squarely to face the issue." Appendix to Petition for Writ of Certiorari (hereinafter App.), at A7. *See*, *Delgado v. Smith*, No. 88-1880-CIV-JWK (S.D.Fla. 1988), *reprinted at* App. at A35, *affirmed by Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988), *reprinted at* App. at A1; *Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988); *Zaldivar v. City of Los Angeles*, 590 F.Supp. 852 (C.D. Cal. 1984), *rev'd on other grounds*,

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4 The argument summarized here is made more fully in the Montero Opp., Pp. 6-8, 9-13.

780 F.2d 823 (9th Cir. 1986);[5] *Gerena-Valentin v. Koch*, 523 F.Supp. 176 (S.D.N.Y. 1981).

Nor do petitioners' more imaginative claims fare any better. As to petitioners' concepts of "state action," the lower court decisions do not conflict with this Court's decisions. *See, e.g., Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)(two-part test: state-created right and state actor). Here, the right of initiative is not a state-created right, but one reserved by the people in their constitution. Nor are non-governmental respondents (who circulated the petitions) state actors, since initiatives are not public functions "traditionally the exclusive prerogative of the state," *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974); nor was circulation of the petition "state compulsion" of a state-enforced custom, *Adickes v. Kress & Co.*, 398 U.S. 144 (1970); nor can the actions of citizens circulating petitions be fairly treated as those of the state itself, *Jackson*, *supra*; nor is there "joint action" in initiatives, *Lugar*, *supra*, 457 U.S. at 941, since the state is barred from actions reserved to the people.

As to petitioners' claims that the lower court ignored *Allen v. State Board of Elections*, 393 U.S. 544 (1968), respondents note that *Allen* dealt specifically with odious attempts to dilute the impact of black voting by circumventing § **5** of the Voting Rights Act. S.Rep. No. 417, 97th Cong., 2d Sess. 6, *reprinted in* 1982

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5 Petitioners cite the Ninth Circuit's decision in *Zaldivar* for the proposition that the Ninth Circuit rejected the Voting Rights Act analysis by the District Court in that case. Pet. at 15, n.15. Petitioners ignore the Ninth Circuit's statement that "we do not review the court's decision on the Voting Rights issue for legal error. We hold only that plaintiffs' argument is plainly not frivolous under the first prong of Rule 11." 780 F.2d at 834.

U.S. Code, Cong. & Admin. News 177, 183. This case comes under §§ 4(f)(4) and 203 of the Act.

Finally, as to petitioners' claims that the lower courts failed to defer to the Attorney General's interpretive guidelines, respondents note that both the lower courts examined those guidelines carefully and abided by them. The guidelines explicitly state that decisions as to what materials are covered by the relevant portions of the Act were delegated to the affected jurisdictions. 28 C.F.R. §§ 55.2(c), 55.14(c), 55.19(a). The courts in this case and in *Montero* examined several jurisdictions' actions and determined that initiative petitions were not intended to be covered. App. at A9-11; *Montero*, 861 F.2d at 608-9, 609 n.4. In addition, petitioners fail to understand this Court's distinction between mandatory regulations and interpretive guidelines. *Hillsborough County, Florida v. Automated Medical Laboratories*, 471 U.S. 707, 718 (1985)(agencies "will make their intentions clear if they intend for their regulations to be exclusive"); *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977).

III. THE POSITION OF THE JUSTICE DEPARTMENT UNCONSTITUTIONALLY INFRINGES ON RESPONDENTS' RIGHTS.

If the Court determines that a writ of certiorari should issue, non-governmental respondents respectfully suggest that an appropriate area of review would be the unconstitutional effect of the position of the United States Department of Justice.[6]

Now that two different circuits have rejected the view that the Department of Justice guidelines require citizens to print their initiative petitions in multiple languages, the Department of Justice should stop pressing a contrary view. Nevertheless, as recently as February 14, 1989, the Department of Justice sent its amicus brief to members of Congress to explain its views on the matter. Letter from Thomas M. Boyd, Assistant Attorney General to Hon. Benjamin A. Gilman, Feb. 14, 1989.

This Court may wish to affirm summarily the lower court decisions in this regard, or to issue a writ of cer-

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6 Ordinarily respondents would file a cross-petition for certiorari on this constitutional issue. S.Ct.R. 19.5. Respondents, however, do not seek to alter in any way the judgment below. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n. 20 (1979). Respondents' request is the mirror image of *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982), in that here respondents wish to support on constitutional grounds a decision below made partially on statutory grounds. The relief requested under this claim would not go further than that provided below, since the Eleventh Circuit explicitly rejected the Department of Justice's interpretation of its own guidelines as beyond the statute. App. at A11.

tiorari to affirm the lower court decisions on this point. If the Court determines to review any aspect of this case, respondents would urge that the Court also examine this issue.

CONCLUSION

Respondents respectfully request this Court to affirm summarily the lower courts' decisions, to review only the issue of whether the Department of Justice interpretive guidelines are unconstitutional or beyond the scope of the Act, or to deny the petition entirely.

RESPECTFULLY SUBMITTED,

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